

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DARREN WILLIAMS,

Plaintiff,

vs.

9:09-CV-1258
(NAM/DEP)

BRIAN FISCHER, Commissioner of New York State
Department of Correctional Services; LORI MONTROY,
Nurse Administrator; MR. PHELIX, Corrections Captain;
DONNA PEPIN, Nurse; KENNETH SCHWENKE,
z Corrections Sergeant; LARRY DEUYOUR, Corrections
Officer; and STEPHEN TRAVERS, Corrections Officer.

Defendants.

APPEARANCES:

OF COUNSEL:

Darren Williams
04-A-5841
v Elmira Correctional Facility
P.O. Box 500
Elmira, New York 14902
Plaintiff, Pro se

Eric T. Schneiderman
Attorney General for the State of New York
The Capitol
Albany, New York 12224
Attorney for Defendants

Roger W. Kinsey, Esq.
Assistant Attorney General

w Norman A. Mordue, Chief U. S. District Judge

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

In this *pro se* action under 42 U.S.C. § 1983, plaintiff, an inmate in the custody of the New York State Department of Correctional Services (“DOCS”), claims that defendants violated his constitutional rights. Plaintiff alleges a deprivation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendment as well as violations of state regulations. Defendants moved to

dismiss portions of the complaint under Fed. R. Civ. P. 12(b)(6) (Dkt. No. 27) and plaintiff opposed the motion. (Dkt. No. 30). The motions were referred to United States Magistrate Judge David E. Peebles for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c).

In the Report and Recommendation (Dkt. No. 37), Magistrate Judge Peebles recommends that the Court: (1) dismiss plaintiff's claims for deliberate medical indifference; (2) dismiss all claims against Commissioner Fischer and Nurse Administrator Montroy; (3) dismiss all claims for violations of state law and regulations and plaintiff's cause of action for negligence; (4) dismiss plaintiff's conspiracy cause of action; (5) dismiss any claim for damages deemed asserted against the defendants in their official capacity; and (6) deny defendant's motion to dismiss based upon qualified immunity without prejudice to renew. Magistrate Judge Peebles also recommended that plaintiff's due process claim be dismissed unless plaintiff states, in writing, that he is relinquishing all claims affecting the length of his confinement resulting from a Tier III hearing.

Plaintiff filed specific objections to the Report and Recommendation. (Dkt. No. 38). Defendants have not responded. In view of plaintiff's objections, pursuant to 28 U.S.C. § 636(b)(1)(c), this Court conducts a *de novo* review of these issues.

DISCUSSION

With regard to plaintiff's due process claims stemming from the disciplinary hearing conducted in November 2006, plaintiff has informed the Court that he, "foregoes all such claims affecting the duration of his confinement". *See Plaintiff's Objections*, Dkt. No. 38, p.1. Accordingly, as recommended by Magistrate Judge Peebles, plaintiff's due process claims survive dismissal. In his remaining objections, plaintiff seeks to "clarify" certain aspects of the

complaint. Specifically, plaintiff makes assertions relating to Eleventh Amendment issues and the capacity in which he has sued each defendant. Moreover, plaintiff “reserves” the right to replead federal and state law claims, including conspiracy allegations, against Pepin, Phelix and Montroy.¹ Essentially, plaintiff’s objections address the merits of his claims and notifies the Court of his intention to replead. In the Report and Recommendation, Magistrate Judge Peebles specifically afforded plaintiff an opportunity to amend his complaint to assert claims, including those claims he recommended be dismissed, as against all defendants, with the exception of Commissioner Fischer.² Accordingly, plaintiff’s “objections” in this regard are moot. These allegations may be asserted in an amended complaint filed in accordance herewith.

CONCLUSION

It is therefore

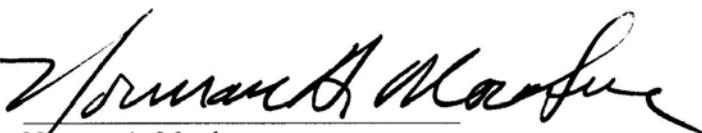
ORDERED that the Report and Recommendation by United States Magistrate Judge David E. Peebles (Dkt. No. 37) is adopted in its entirety; and it is further

ORDERED that the Clerk provide copies of this Order to all parties; and it is further

ORDERED that if plaintiff chooses to replead his claims and file an amended complaint, any such pleading must be filed on or before April 11, 2011.

IT IS SO ORDERED.

Date: March 8, 2011



Norman A. Mordue
Chief United States District Court Judge

¹ Plaintiff has no objection to the Court’s recommendation to dismiss the deliberate indifference claims or conspiracy claims. (Dkt. No. 38, p. 2).

² In his Objections, plaintiff states that he has “no objection to all claims being dismissed against Mr. Fischer”. (Dkt. No. 38, p. 3).